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the adoption of the statute to exercise one way or the other, would be, at least, *to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself.*

Whatever the ordinary rule of evidence with reference to inferences to be drawn from the failure of parties to produce testimony that must be in their power to give may be, we are satisfied that the defendant, with respect to exercising his privilege under the provisions of the act in question, is entitled to rest in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify on his own behalf; that to permit such an inference, would be, to violate the principles and the spirit of the Constitution and the statute, and defeat, rather than promote, the object designed to be accomplished by the innovation in question.

We are of opinion, therefore, that the court erred in permitting the District Attorney to pursue the line of argument to which objection and exception were taken, and intimating its approbation of the ground taken, and, especially after what had transpired, in refusing the instruction asked on behalf of defendant for the purpose of correcting any erroneous view that might have been impressed on the minds of the jury. We think such instruction proper in all cases where the defendant desires it.

Judgment reversed, and a new trial ordered.

Court of Appeals of Kentucky.

JOHN D. ELLIOTT, Appellant, *v.* HENRY NICHOLS, Appellee.

A conveyance to husband and wife and their heirs prior to 1850, constituted in Kentucky, as at common law, an estate by entireties, which neither husband nor wife could sever or make liable for debts as against the other.

The statute of 1850, abolishing the right of survivorship and turning the estate into a tenancy in common, is not retrospective.

Semble, the legislature would have had no constitutional power to divest parties of such right of survivorship acquired by a conveyance in entireties before the passage of the statute.

Appeal from Nelson Circuit Court.

The opinion of the court was delivered by

WILLIAMS, C. J.—January 3d 1837 Henry Nichols conveyed to his daughter Elizabeth, and her husband, Henry Nichols, certain lands to them and their heirs for ever, which, together with other lands the husband mortgaged, March 9th 1865, to appellants, to secure various specified debts.

Mrs. Elizabeth Nichols died in the year 1861, leaving appellees as her children and heirs at law, who resist the foreclosure of the mortgage on one-half of the land so conveyed by their grandfather to their father and mother, claiming that by the Revised Statutes enacted in the year 1850, the right of survivorship was abolished in such estates, and they held as tenants in common, and therefore by moieties, with a mutual right of curtesy and dower of the survivor in the half of the other, hence they insist that the creditors could only foreclose as to the life interest of their father as tenant by the curtesy in their mother's half of said land. Sect. 14, art. 4, ch. 47, 2 Stant. Rev. Stat. 27, provided that "where any real estate or slave is conveyed or devised to husband and wife, unless a right of survivorship is expressly provided for, there shall be no mutual right to the entirety by survivorship between them, but they shall take as tenants in common, and the respective moieties be subject to curtesy or dower with all other incidents to such a tenancy."

By sect. 14, ch. 21, 1 Stant. Rev. Stat. 262, it is declared that "no part of this revision is retrospective unless expressly so declared." And although the language and construction of the enactment relative to such estates might be construed to apply to existing titles, and abolish the right of survivorship between husband and wife, and change the estate from an entirety into one in common, yet as the language is not necessarily expressive of such an intention, we would not hasten to give it a retrospective application, especially in view of a want of constitutional authority in the legislature to so enact. Husband and wife having but one, united legal existence, conveyances to them by the common law which remained in force in this state until our revision of 1850, created a peculiar estate in which both held the entire title, consequently the death of either conferred no new estate or title on the other, but only destroyed the possibility of the decedent's survivorship, in which case that one would have remained the sole

owner. By the common law joint tenants could destroy the right of survivorship by the sale of their respective portions, or by compelling, as they could do, partition, whilst this peculiar tenancy of husband and wife could not be destroyed by the sale of either, nor could partition be compelled by any means known to the law.

This possibility of survivorship, and contingent possibility that the unity between joint tenants would not by any means be destroyed, and the right of survivorship remain, was not such a present vested interest as created or constituted an estate, either leviable by execution, subject to decretal sale, or even vendible and assignable by the tenant himself, but was a mere legal incident to such estate, as a rule of law, which the legislature might abolish. So in *Edwards* v. *Varrick*, 5 Davies 668, the Court of Errors of New York, in able, exhaustive opinions by Judge BEARDSLEY and others, held that when a father had devised two separate tracts of land severally to his sons Joseph and Medcif and their heirs and assigns, but should either die without lawful issue his tract to go to the survivor, and left the two sons executors, with others, and they, as executors, mortgaged Joseph's tract, and Joseph having afterwards died without issue, and subsequently Medcif died leaving issue, who brought ejectment against the mortgagee in possession, it was held that by the father's will Joseph took a determinable, qualified, or base fee in the land primarily devised to him, which was certainly effective as an estate for life, but that no present estate or interest therein passed to Medcif during Joseph's life, his interest being what the law terms a mere possibility of future interest, which, being neither an estate, interest, nor right *in esse,* was incapable of being transferred by grant or assignment at law.

In equity, however, when a party, for a valuable consideration, has sold such a possible interest, he will be deemed the trustee of his vendee, and, when he gets the title, as holding it for him, and compelled to release it to the vendee.

But, as said by the Court of Appeals of Virginia in *Thornton* v. *Thornton*, 3 Randolph 183, all the books agree *una voce* that husband and wife not only cannot compel each other to make partition, but, even if they concur in the wish, they have not the power to sever the tenancy.

It is a sole, and not a joint, tenancy. They have no *moieties.* Each holds the entirety. They are one in law, and their *estate one and indivisible.* If the husband alien, if he suffer a recovery, if he be attainted,—none of these will affect the right of the wife, if she survive him. Nor is this by the *jus accrescendi.* There is no such thing between them. That takes place where, by the death of one joint tenant, the survivor receives an accession, something which he had not before—*the right of the deceased.* But as between husband and wife the survivor *takes nothing from the decedent,* acquires no new title, nor interest, nor estate thereby, but takes by the original conveyance the whole, because invested thereby with the entire estate. The survivor gets the entire estate by virtue of the title being in him, or her, by the original conveyance, but rid of the possible contingency of the other surviving and retaining the estate because likewise so invested in that party. It is plain, therefore, that the husband had the entire title to this land by the original conveyance in the year 1837; so had his wife; and had she survived him she would have retained it, and neither the husband, nor his heirs or assigns, nor the mortgagees, nor even the purchasers under a decretal sale foreclosing the mortgage, would have held against her. Nor can her heirs claim or hold any portion of the land as against the surviving husband or his assigns, but the whole tract should have been ordered to be sold in payment of the mortgage-debts, or a sufficiency for said purpose. As the entire title and estate was vested in both the husband and wife, the legislature could not have divested any portion of the title, and, we must presume, did not intend to do so, but that as a rule of property, and a declaration of the legal effect of such deed subsequently made and the legal rights of the parties thereunder, said statute was enacted. The numerous cases recognising the common-law rules as to such conveyances by this court need not be referred to, all harmonizing as they do with this opinion.

Judgment reversed.